

STATE OF MICHIGAN
COURT OF APPEALS

CHARLES H. MORGAN,

Plaintiff-Appellant,

V

CITY OF WYOMING,

Defendant-Appellee.

UNPUBLISHED

January 14, 2003

No. 235661

Kent Circuit Court

LC No. 00-008506-CZ

Before: Meter, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting summary disposition in favor of defendant. We affirm.

Plaintiff resides in the City of Wyoming (“Wyoming”) adjacent to defendant’s property. Located on defendant’s property is the Wyoming Public Library. Both properties are zoned as residential. The library has been in existence since the 1970’s. Plaintiff built his home in 1986. Wyoming approved an expansion and remodeling of the present library increasing its size from 17,500 square feet to about 48,000 square feet. Part of the remodeling plans included an 813 square foot coffee shop with seating accommodating twenty-seven customers to be operated by an independent contractor or vendor. After construction began on the project, plaintiff filed a complaint arguing that the inclusion of the coffee shop constituted the placement of a commercial business in a residential zone and sought an injunction enjoining defendant from constructing the library addition. The trial court granted defendant’s motion for summary disposition and dismissed the case. Construction is now complete on the project.

Plaintiff argues that summary disposition was inappropriate in this matter because the trial court did not have sufficient facts to conclude that the construction of a coffee shop within an existing library was a proper incidental use of the library building located in a residential zone. We disagree. We review a trial court’s grant or denial of a motion for summary disposition de novo. *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although it is not specifically stated in the trial court opinion, because the trial court considered documentary evidence before deciding the summary disposition motion, we will analyze the issue under MCR 2.116(C)(10). For a motion for summary disposition under MCR 2.116(C)(10), this Court considers the affidavits, pleadings, depositions, admissions, and documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998). A motion for

summary disposition under MCR 2.116(C)(10) is properly granted if there is no genuine issue of material fact, entitling the moving party to judgment as a matter of law. *Id.* In *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999), our Supreme Court, clarifying the correct legal standard under MCR 2.116(C)(10), stated that “[t]he reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion.”

The Wyoming Code of Ordinances (“Wyoming Code”) divides the property into several different uses. Relevant to the issue here is the residential district. Section 90-96¹ of the Wyoming Code, regarding principal permitted uses in residential districts states as follows:

Sec. 90-96. Principal permitted uses.

In the R-1, R-2 and ER residential districts, the following uses shall be permitted:

(1) Single-family detached dwellings. For mobile home standards see section 90-841 et seq.

(2) Churches and church facilities normally incidental thereto, provided that ingress and egress from the site is onto a major thoroughfare or collector street. Church sites shall be a minimum of three acres.

(3) Publicly owned facilities, except public elementary, intermediate or high schools.

(4) Off-street parking.

(5) Accessory buildings and uses customarily incidental to the principal permitted uses.

(6) Foster care facilities, nursery schools, day nurseries and child care facilities for the care of not more than six people as defined by the Michigan Family Independence Agency.

(7) Home occupations.

Section 90-1² of the Wyoming Code defines an “accessory use” as “a use customarily incidental and subordinate to the principal use and which is located on the same lot.” Accessory uses exist in cases where “the use in question enhance[s] the principal use of the property.” *Lerner v Bloomfield Twp*, 106 Mich App 809, 813-814; 308 NW2d 701 (1981). Additionally, the incidental use necessarily depends on the principal use, and the incidental use must further the

¹ There is an internal citation to this section of the Wyoming City Code providing as follows, Code 1983, § 60.41; Ord. No. 15-97, § 2, 6-16-97; Ord. No. 18-98, § 3, 8-17-98.

² There is an internal citation to this section of the Wyoming City Code providing as follows, Code 1983, § 60.1; Ord. No. 21-98, § 5, 10-5-98; Ord. No. 15-99, § 1, 11-15-99; Ord. No. 8-00, § 1, 5-15-00; Ord. No. 10-01, § 1, 5-21-01; Ord. No. 15-01, § 1, 8-6-01.

principal use of the property. *Id.* As such, here, the coffee shop must further the use of the library as a library in order to constitute an accessory use. *Id.*

Plaintiff argues that the coffee shop is a commercial enterprise and is not a use “customarily incidental” to the principal permitted use of the library, and thus is not permitted in the residential zone. Our review of the record reveals that the coffee shop area encompasses only a very small portion of the square footage of the library, specifically 813 square feet out of a total of almost 48,000 square feet. Also, the operational plans called for the shop to only serve beverages and baked goods, and not to allow cooking on the site. These facts support the assertion that the coffee shop area will enhance the experience of library patrons by allowing them to purchase something small to eat or drink while at the library. Also it does not appear that the coffee shop was intended to be a separate destination point distinct from the library. For these reasons, as the trial court correctly pointed out, we believe the coffee shop will enhance the use of the library as a library and is a proper “accessory use” as defined in the Wyoming Code at § 90-1. *Lerner, supra*, 106 Mich App 813-814.

Plaintiff also argues that the trial court improperly considered the affidavits attached to defendant’s motion for summary disposition because the statements offered in the affidavits are not factual statements but legal conclusions, and do not specifically address the violation of Wyoming’s zoning laws. A motion for summary disposition based on the lack of a material factual dispute must be supported by documentary evidence. MCR 2.116(G)(3)(b), *Meyer v City of Center Line*, 242 Mich App 560, 574; 619 NW2d 182 (2000). Defendant had the duty to specifically identify the matters having no disputed factual issues. MCR 2.116(G)(4), *Maiden, supra*, 461 Mich 120. Defendant also has the initial burden to support its position by affidavits, depositions, admissions, or other documentary evidence. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). An affidavit submitted in support of or in opposition to a motion must affirmatively show that the affiant, if sworn as a witness, could testify competently to the facts stated in the affidavit. MCR 2.119(B)(1)(c), *Regents of the University of Michigan v State Farm Mutual Ins Co*, 250 Mich App 719, 728; 650 NW2d 129 (2002). We find that defendant complied with these requirements when it attached affidavits to its motion providing testimony indicating that the inclusion of a coffee shop in a public library is a common incidental use and would not change the character of the building as a library, and the trial court, contrary to plaintiff’s argument, properly considered the affidavits. *Morales, supra*, 458 Mich 294.

Plaintiff, as the party opposing the motion, then had the burden of showing by evidentiary materials that a genuine issue of disputed fact existed, and that the disputed factual issue is material to the dispositive legal claims. *Smith, supra*, 460 Mich 455; *State Farm v Johnson*, 187 Mich App 264, 267; 466 NW2d 287 (1990). Plaintiff may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001). Further, speculation and conjecture are insufficient, however, plaintiff need not rebut every possible theory which the evidence could support. *Detroit v GMC*, 233 Mich App 132, 139; 592 NW2d 732 (1998). Our review of the record reveals that plaintiff did not comport with these requirements, and instead, responded with allegations attacking the credibility of the affiants. Because plaintiff did not provide documentary evidence setting forth specific facts showing that

a genuine issue of fact existed for trial, we find that plaintiff's arguments fails. *Quinto, supra*, 451 Mich 362; *Karbel, supra*, 247 Mich App 97.

Affirmed.

/s/ Patrick M. Meter

/s/ Janet T. Neff

/s/ Pat M. Donofrio